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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), the Court held that the defendant's prior acquittal on charges of willfully attempting to evade taxes did not preclude a subsequent proceeding against him to recover a monetary penalty for fraudulent avoidance of income tax. In our opening brief (Br. 14-16) we argued that *Helvering* supported the position that *Coffey* v. *United States*, 116 U.S. 436 (1886), precludes the imposition only of criminal punishments following a criminal acquittal. Respondent disputes that argument (Resp. Br. 10-11), contending that the *Helvering* Court distinguished *Coffey* "on the grounds that *Helvering* involved a 'civil administrative sanction,' not a penalty and most certainly not a forfeiture" connected to criminal conduct. That contention, however, hardly rebuts the government's submission.

There can be no serious question that the penalty involved in *Helvering* was related to allegedly criminal conduct. Indeed, the conceded fact that the criminal charge and the penalty proceeding "[arose] out of the same transactions and facts" (303 U.S. at 398) was the basis for Mitchell's argument that the penalty proceeding was barred by the prior acquittal. It is equally clear that the holding in *Helvering* did not rest upon any distinction between a forfeiture and a strictly monetary penalty (Resp. Br. 10); in fact, the Court equated the two types of sanctions, concluding that they were civil in nature because they have historically been "enforcible by civil proceedings" (303 U.S. at 400). Contrary to respondent's claim, therefore, the *Helvering* Court distinguished *Coffey* solely on the ground that *Helvering*, like the case at bar, involved a *civil* proceeding that required a different degree of proof from the prior criminal charge (303 U.S. at 405).

2. Respondent agrees (Br. 11-12) that, because there is a "difference in the degree of the burden of proof in criminal and civil cases" (*Helvering*, 303 U.S. at 391), res judicata is no bar to a civil action following a criminal acquittal. He disputes our argument (U.S. Br. 14), however, that *Helvering* also prevents application of collateral estoppel in the same circumstances. But, whether or not *Helvering* settles this issue (see U.S. Br. 14-15), any doubt regarding the inapplicability of collateral estoppel to successive criminal and civil cases was expressly resolved in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972). There the Court squarely held that "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel" (409 U.S. at 235).[1]

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[1]Respondent places great reliance (Resp. Br. 13) on the statement in *One Lot Emerald Cut Stones* that "[c]ollateral estoppel would bar a forfeiture under [19 U.S.C.] 1497 [the pertinent forfeiture statute] if, in the earlier criminal proceeding, the elements of a § 1497 forfeiture had

3. The crucial issue in this case is whether forfeiture under 18 U.S.C. 924(d) is a civil or a criminal penalty.[2] In our opening brief (Br. 17-36) we argued that, under the analysis set forth in *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980), the forfeiture penalty established by Section 924(d) is plainly civil in nature. Both respondent and the amicus argue to the contrary that *Ward* demonstrates the criminal nature of a Section 924(d) forfeiture. For the most part, our opening brief answers the claims raised by respondent and the amicus concerning this issue, but certain of their assertions warrant a specific reply.

a. Amicus takes the government to task (Amicus Br. 33) for attempting to "resurrect a pre-*Helvering* analysis" in our construction of Section 924(d). With due respect, it is amicus — not the government — that is attempting to turn back the clock.

Throughout its brief, amicus urges the Court to focus on the subjective effect of forfeiture upon individual gun owners, suggesting that this approach deserves "precedence" over any other form of analysis (Amicus Br. 32). It is true that, in several of the cases most heavily relied upon by the amicus, this Court emphasized the subjective impact of avowedly civil penalties in the course of concluding that, notwithstanding express legislative classifications and possible legislative objectives other than punishment, the penalties were in fact criminal and punitive. See Amicus Br.

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been resolved against the Government" (409 U.S. at 234). This argument, however, simply ignores the fact that *One Lot* clearly set forth a two-pronged test for the proper application of collateral estoppel: both proceedings must (1) involve the same elements (409 U.S. at 234) *and* (2) proceed under the same burden of proof (*id.* at 235).

[2]Although the amicus brief challenges at some length (Amicus Br. 5-34) the government's analysis of *Coffey* v. *United States*, it nevertheless recognizes that *Coffey* merely precludes the imposition of criminal — not civil — penalties following a criminal conviction (Amicus Br. 34).

at 7, 8, 9, 22, 27, 28, 39, citing *United States* v. *Constantine*, 296 U.S. 287 (1935), and *United States* v. *La Franca*, 282 U.S. 568 (1931). Since *Helvering*, however, where it was expressly noted that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" (303 U.S. at 399), this Court has never — to the government's knowledge — concluded that a putatively civil penalty was in fact criminal in nature. The Court should surely hesitate before returning to the subjective and essentially standardless pre-*Helvering* analysis advocated by the amicus. As set out at length in our opening brief (Br. 17-36), Congress clearly indicated that Section 924(d) was to be treated as a civil, remedial sanction, and the subjective impact of the penalty on gun owners is not so punitive "as to negate that intention." *United States* v. *Ward*, 448 U.S. at 249.[3]

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[3]In quoting from *Helvering* on pages 32-33 of its brief, amicus inserts the word "prior" in Justice Brandeis's analysis to suggest that, in construing a particular penalty provision, a court should not focus upon the precise constitutional right purportedly infringed by the imposition of the penalty. The alteration of meaning caused by insertion of new language in Justice Brandeis's opinion undermines the conclusion amicus asks the Court to draw. In any event, this Court's recent decision in *United States* v. *Ward* refutes amicus's submission. In *Ward*, the Court did not conclude that the "classification of the sanction" as civil or criminal took "precedence" over the "type of procedural rule invoked" (Amicus Br. 32). Rather, the Court inquired whether the penalty was " 'so far criminal in [its] nature' as to trigger the Self-Incrimination Clause of the Fifth Amendment." 448 U.S. at 253-254. Thus, as set forth in our brief (Br. 36-41), a particular penalty may be "quasi-criminal" for some constitutional purposes, but not others. Compare *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965) (exclusionary rule applies to state forfeiture proceeding), with *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931) (Double Jeopardy Clause does not apply to in rem forfeitures). The amicus's monolithic approach — whereby a particular penalty would be classified as either civil or criminal for all purposes — is simply not the law.

b. Amicus asserts (Br. 40-41) that the Gun Control Act was designed solely to punish criminals. But, while the Gun Control Act was obviously designed in part to punish criminals, the statute had much broader overall objectives, including "control[ling] the indiscriminate flow of such weapons across State borders[,]" "assist[ing] and encourag[ing] States and local communities to adopt and encourage stricter gun control laws" (H.R. Rep. 1577, 90th Cong., 2d Sess. 8 (1968)), and "restricting public access to firearms" (*Huddleston* v. *United States*, 415 U.S. 814, 824 (1974)). Section 924(d) is designed to eliminate stocks of firearms that have been used or intended for use outside regulated channels of commerce, and this remedial goal clearly advances the "broad prophylactive purpose" of the gun control legislation. *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 15.

Amicus's argument (Br. 41) based on the claim that Section 924(d) "authorizes forfeitures only following conviction" is unpersuasive because its premise is flatly wrong. In contrast to the criminal provisions of 18 U.S.C. 922, which proscribe only the completed act of engaging in the business of dealing in firearms without a license, the forfeiture sanction reaches firearms that are merely "intended to be used" in violation of the law. Forfeiture under Section 924(d), therefore, is not predicated on criminal wrongdoing, let alone a criminal conviction. *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276, 1278 (5th Cir. 1980) (forfeiture may be ordered even where no actual criminal violation occurs).[4]

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[4]This factor alone rebuts amicus's suggestion (Br. 58-61) that there is no non-punitive, remedial purpose behind Section 924(d). The remedial goals of the statute are indeed reached by means of "incapacitation" (Amicus Br. 59), but the express terms of the statute prevent persons other than "criminals" from engaging in unregulated commerce in lethal weapons. Thus, the express remedial objectives of the statute extend beyond "criminal punishment" (Amicus Br. 59).

c. Turning to the considerations set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), respondent (Br. 16-17) and amicus (Br. 51) argue that forfeitures have "historically been regarded as punishment." But just the opposite is true. As the Court stated in *Helvering*, 303 U.S. at 400, "[f]orfeiture of goods or their value " * * * are * * * sanctions * * * enforcible by civil proceedings since the original revenue law of 1789 * * * [and] have been upheld against the contention that they are essentially criminal."

d. Amicus contends (Br. 49-50) that the decision in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), contradicts our argument (Br. 32) that the *Mendoza-Martinez* scienter factor supports the civil nature of the sanction established in Section 924(d). In *Coin & Currency*, the Court held that applicable administrative remission and mitigation provisions under 26 U.S.C. 7302 limited forfeiture to persons "significantly involved in a criminal enterprise." 401 U.S. at 721-722. Therefore, the Court held that, under its earlier ruling in *Boyd* v. *United States*, 116 U.S. 616 (1886), the self-incrimination clause was applicable to forfeiture proceedings under Section 7302. 401 U.S. at 721-722. On the ground that a forfeiture under Section 924(d) is subject to the same remission and mitigation provisions applicable to Section 7302 actions, amicus argues that Section 924(d) is a criminal penalty because it "encompasses an implicit requirement of *scienter*" (Amicus Br. 50). However, the administrative remission and mitigation procedures relied upon by amicus demonstrate, if anything, that the forfeiture sanction is totally devoid of any scienter constraint, and is therefore civil in nature.

Administrative remission and mitigation procedures have been created precisely because in rem forfeitures do not depend upon any evidence of criminal intent; the exercise of administrative grace inherent in remission or mitigation

prevents unduly harsh application of a sanction that does not itself embody a scienter requirement. Indeed, in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-690 (1974), this Court expressly held that its prior decision in *Coin & Currency* — the case upon which amicus grounds its scienter argument — did not bar an in rem forfeiture even though the property owner was totally innocent of criminal wrongdoing. Thus, the Court recognized that forfeiture does not turn upon the criminal (or innocent) intent of the property owner. In a Section 924(d) case, for example, a collection of firearms could be forfeited even if the actual owner of the collection did not use or intend to use the guns in violation of the Gun Control Act.[5] The administrative procedures cited by amicus "mitigate the harshness" of this result (*Calero-Toledo*, 416 U.S. at 689-690 n.27), but do not alter the undeniable fact that forfeiture under Section 924(d) is not a "criminal" punishment because it can indeed be imposed upon an innocent property owner.[6]

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[5]This could occur if the owner of the collection lent it to a third party who subsequently intended to use the firearms in violation of the Gun Control Act. Cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.* (innocent owner leased forfeited yacht to drug traffickers).

[6]Amicus's scienter argument also disregards the primary analytical importance of this Court's decision in *Coin & Currency*. In that case, the Court concluded that a forfeiture statute may be "so far criminal in [its] nature" as to trigger the Fifth Amendment's self-incrimination clause. *United States* v. *Ward*, 448 U.S. at 253-254. The Court did not, however, intimate that the "quasi-criminal" character of the forfeiture sanction required application of the full panoply of criminal law constitutional protections to a forfeiture proceeding. See U.S. Br. 36-41. Thus, by focusing on "scienter" the amicus misses the main import of *Coin & Currency* — *i.e.*, that "quasi-criminal" forfeiture actions need not be processed in accordance with the full range of criminal procedural and substantive rights. See *Various Items of Personal Property* v. *United States*, 282 U.S. at 581 (an in rem forfeiture is "no part of the punishment for the criminal offense" for purposes of the Double Jeopardy Clause).

d. Finally, relying principally on the Court's observation in *Helvering*, 303 U.S. at 401, that the tax penalty at issue there was remedial because it was intended "as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation" of tax fraud, amicus argues (Br. 52-53) that the fact that forfeitures under Section 924(d) are not compensatory automatically establishes that they are not remedial. But, as the *Helvering* Court also observed, "[r]emedial sanctions may be of varying types" (303 U.S. at 399). Even amicus recognizes (Br. 40) that the Gun Control Act was passed, in part, to alleviate the "senseless slaughter" arising from unregulated interstate firearms traffic. H.R. Rep. 1577, *supra*, at 7. Section 924(d) was plainly drafted to further this vital legislative goal, and amicus's assertion that the statute is not "remedial" merely because it is not "compensatory" ignores the broad prophylactic aim of the Gun Control Act.[7]

For the reasons set forth above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[7]In addition, as noted in our opening brief (Br. 25-26 n.11), "forfeited firearms may, in a very real sense, 'reimburse the Government for the heavy expense of investigation' of a gun control violation since the federal government can and does use the forfeited firearms."